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# Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 658.

UNION LEADER CORPORATION, *Petitioner*,
*v.*
NEWSPAPERS OF NEW ENGLAND, INC., ET AL.,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

## BRIEF OF RESPONDENTS PHILIP S. WELD AND ESSEX COUNTY NEWSPAPERS, INC., IN OPPOSITION.

### Counter-Statement of Questions Presented.

1. Whether it was error for the Court of Appeals to conclude that the respondent Haverhill Gazette Company did not violate section 2 of the Sherman Act by the defensive giving of certain discriminatory advertising benefits where the trial court had found the discriminations were not large, the period was short, the provocation to retaliate great, and the Gazette was acting only after it had been put in peril of insolvency in the equity sense as a result of petitioner's attempt to monopolize.

2. Where petitioner, owner of an economically natural monopoly newspaper in one local market, starts a rival newspaper in another local market in competition with the strike-bound existing natural monopoly newspaper and attempts to buy the established newspaper when it is on the verge of insolvency in the equity sense as a result of petitioner's attempt to monopolize by means of a boycott and other acts, was it clearly erroneous to conclude that certain corporations and individuals who were respectively publishers of or interested in separate natural monopoly newspapers in other separate local markets did not attempt to monopolize, substantially lessen competition or tend to create a monopoly by organizing and purchasing stock in the respondent Newspapers of New England, Inc. (NNE), which thereupon bought all the stock from the owners of the established newspaper, if—

(*a*) the owners of the established paper solicited the offer to purchase so they would not be forced to make a sale they did not want to make to petitioner;

(*b*) the established newspaper, as an independent enterprise, has continued to compete fairly with petitioner's rival newspaper;

(*c*) all the shareholders in NNE felt their investment was commercially justified; many acted in part because individually they did not approve petitioner's predatory tactics; some acted in part because as individuals they sympathized with the owners of the established newspaper and feared they might at some time be subject to a similar distress;

(*d*) all the shareholders in NNE acted solely in this situation, and made no commitment to invest in any other newspaper situation, and did not intend or contemplate, and there has not in fact been, any

linkage with or between newspapers in other separate, local markets;

(c) there was no evidence or finding that petitioner or any other newspaper publisher intended to enter or was affected in other separate local markets.

## Counter-Statement of the Case.

Due to petitioner's weaving of portions of testimony with findings, and its inaccurate expansion or phrasing of many findings, we summarize the actual findings.

Only one high-grade local daily newspaper can succeed financially as an independent enterprise in New England middle-sized cities with a population of 20,000 to 100,000.

Haverhill likewise is economically a one-newspaper city. The relevant market, the Haverhill market, measured by product and area, is such that only one successful high-grade daily newspaper is economically possible (R. 1068-1069).

The Haverhill Gazette was the only one daily local newspaper in Haverhill for more than one hundred years prior to 1957 (R. 1068).

On November 20, 1957, Local 38 of the International Typographical Union commenced a strike at the Gazette (R. 1069).

William Loeb, the principal figure in the petitioner, Union Leader Corporation (ULC), which published the one local daily newspaper in Manchester, New Hampshire, was contacted by certain merchants in Haverhill (R. 1069-1070).

The petitioner, on December 5 and 12, 1957, published a throwaway shopper news for Haverhill. On December 16, 1957, the petitioner began to publish a daily called "The Haverhill Journal." The merchants assured petitioner that

they would give their advertising to the Journal, and would aid in securing others to do so (R. 1070-1072).

Members of the striking printers were used to distribute petitioner's shopper to let the public know the union was supporting the petitioner's new paper (R. 1076).

Moreover, representatives of the union called upon prospective advertisers with solicitors for the Journal. The union representatives asked merchants not to advertise in the Gazette, while the solicitors asked them to advertise in the Journal (R. 1076).

When the Gazette strike was settled in May, 1958, the petitioner detected a slack in the enthusiasm of the merchant group. On May 22, 1958, the petitioner commenced to pay each $50 a week (R. 1073).

The purpose was to have them induce the enterprises with which they were connected and such other establishments as they could influence to advertise exclusively in the Journal and to refrain from advertising in the Gazette (R. 1074). The merchants, with a minor exception, carried out the agreement to advertise exclusively in the Journal, and, without disclosing their payments, solicited other advertisers for the Journal (R. 1073).

In July, 1958, petitioner promised the merchant group a share of the profits of the Journal, and on December 15, 1958, made a more formal written agreement, promising each large yearly sums plus 3⅛% of the profits, to be effective when the Journal became the only paper published in Haverhill under petitioner's ownership (R. 1075).

In the competition between the Journal and the Gazette both sustained stupendous losses (R. 1069).

During the early part of 1958 J. Wesley Russ, then president of the Haverhill Gazette Company (HG Co.), was in touch off and on with William B. Parry, then associate manager of The New England Daily Newspaper Association,

relative to its labor and general problems. Conversation with Parry about whether other publishers might help the Gazette with money came to nought, and HG Co. had to rely on what it could borrow from local banks.

Inquiries began to be made by brokers and principals as to whether the Gazette was for sale. Some of the approaches were from Loeb (R. 1078).

During the fall of 1958 the Gazette gave some discriminatory advertising rates after it was on the verge of insolvency (in the equity sense as a result of petitioner's attempts to monopolize (R. 1077, 1095-1096).

On October 21, 1958, Loeb made a written offer to purchase the Gazette (R. 1079). Russ informed William Parry and told him, in effect, that, although they did not want to, the stockholders would be forced to sell to Loeb unless other financing was available (R. 1078-1079).

Parry contacted some New England publishers. This led to two meetings in Andover, Massachusetts, on October 31 and November 10, 1958. At the first, the comptroller gave a financial analysis of HG Co. and there was talk of a secured loan, but the principal stockholder of HG Co. was opposed to further borrowing. Her counsel indicated an offer to purchase would be satisfactory if it approximated the offer of petitioner (R. 1080).

At the second meeting the comptroller reviewed the financial, advertising and circulation figures, the Loeb offer was discussed, estimates were made as to how long it would take for the Gazette to break even, and how long the Journal would survive if the Gazette held out and increased in circulation, plus the general financial prospects. There was a general view that in the Haverhill situation only one quality newspaper could make a profit and hope that the Gazette would be that newspaper (R. 1081-1082).

The meeting led to the formation of NNE on December 10, 1958. Stock in that corporation was purchased at $25

per share, and respondent Philip S. Weld bought 250 shares (R. 1082-1083).

Of the shareholders in NNE, Lowell Sun Publishing Company publishes the only daily newspaper in Lowell, and the same applies to Eagle-Tribune Publishing Company in Lawrence, Enterprise Publishing Company in Brockton, Sentinel Printing Company in Fitchburg, Eagle Publishing Company in Pittsfield, Holyoke Transcript-Telegram Publishing Co., Inc., in Holyoke, and Philip S. Weld controls Essex County Newspapers, Inc., which publishes the only daily newspapers in Newburyport and Gloucester. Other subscribing publishing companies publish in their towns the only local daily newspaper published there (R. 1083-1084).

After December 10, 1958, NNE bought all the outstanding stock of HG Co. (R. 1084).

Between December 17, 1958, and September 29, 1959, NNE made loans to HG Co. totalling $194,000, of which $85,000 was repaid, leaving $109,000 outstanding (R. 1084-1085).

In both NNE and HG Co., Lawlor of the Lowell Sun was elected president, Lucey of the Eagle-Tribune, treasurer, and Weld, clerk. No officer or director has received compensation (R. 1085).

By way of emphasis, the District Court also found:

Every NNE shareholder before investing examined or relied upon experts who had examined the financial prospects of HG Co. and reasonably believed an investment was commercially justified (R. 1085).

Many NNE shareholders individually did not approve of Loeb's predatory tactics in Haverhill (R. 1086).

Some NNE shareholders individually sympathized with the owners of HG Co. and feared that they might at some time be victims of a distress similar to that of the Gazette (R. 1086).

The NNE shareholders invested solely in Haverhill and had no agreement, express or implied, to act with respect to any other newspaper situation; there is no connection between the Gazette and any newspaper owned by any NNE shareholder or any corporation with which such shareholder is associated or between the respective newspapers of such shareholders, nor is any linkage in any way contemplated (R. 1086-1087).

None of the relationships which NNE created substantially affects the market power of any NNE shareholder, and factually "the NNE combination does not operate as a restraint of trade, or a monopolization, or an attempt to monopolize the daily local newspaper market in Haverhill, or the daily local newspaper market in a group of New England cities taken as a whole" (R. 1087).

## Argument.

It is manifest that there is no occasion for further review by this Court, for neither the petition nor the record discloses any reason for granting a writ of certiorari.

### Question 1.

The asserted conflict with decisions of this Court does not exist.

The Court of Appeals accepted the findings of the District Court, which plainly indicated that the Gazette gave some discriminatory advertising benefits for a short period by way of defense when it was placed in danger of insolvency by petitioner's attempt to monopolize (R. 1077, 1095-1096).

That attempt commenced with a boycott agreement at the time of petitioner's entry into the Haverhill market in December, 1957 (R. 1071-1072).

Accord, not conflict, is found in the Court of Appeals decision. The Court of Appeals held that the proper acceptance of this Court's reasoning in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 623, led to the conclusion that the Gazette in such circumstances did not have the requisite wrongful intention for an attempt to monopolize and that the District Court would have so concluded had it not erroneously believed it was precluded from doing so (Appendix A of Petition, pp. 31-32).

QUESTION 2.

Here again the claimed conflict is non-existent.

The facts found in this case are totally dissimilar from any in the cases referred to by petitioner. The principles of the cases cited were fully accepted by the Courts below, but the facts did not support petitioner's contentions.

A few brief observations will suffice to indicate the factual differences and lack of conflict.

*Swift & Co.* v. *United States*, 196 U.S. 375, involved a combination of meat dealers to restrict bidding, to bid up prices, to fix prices, to keep a black list and the like, to the exclusion of competitors.

*United States* v. *Columbia Steel Co.*, 334 U.S. 495, was concerned with the purchase of the assets of the largest West Coast steel fabricator by United States Steel Corporation and its subsidiaries.

*Lorain Journal Co.* v. *United States*, 342 U.S. 143, had to do with a newspaper publisher which refused to accept advertising from customers who advertised through a competing radio station.

*United States* v. *Griffith*, 334 U.S. 100, dealt with circuit buying power to negotiate films by the linkage of competitive and closed towns.

*United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, involved du Pont's acquisition of 23% of the stock in General Motors and the reasonable likelihood that this led to its commanding position as supplier of automotive finishes and fabrics to General Motors.

In short, this is the type of situation where a writ of certiorari would be dismissed as "improvidently granted" because the "asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law."

> *Wisconsin Electric Co.* v. *Dumore Co.*, 282 U.S. 813.

Petitioner is, in effect, seeking a new trial by asking this Court to "scrutinize" the record (Petition, p. 12), and by asserting that this Court should draw what it deems "logical though different" conclusions from those drawn by the Courts below (Petition, p. 19).

This is contrary to Rule 52(a) of the Federal Rules of Civil Procedure, and this Court's views of that rule.

> *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341:
>
> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them."
>
> *Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278, 291:
>
> "The rule itself applies also to factual inferences from undisputed basic facts . . ."

Since petitioner accepts the basic facts found, as it knows it must (Petition, p. 19), it therefore has to establish that the conclusions drawn therefrom were "clearly erroneous."

The petition fails to disclose any such error.

A writ of certiorari is not warranted merely to review the evidence or inferences drawn from it.

> *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178.

Alternatively, petitioner wants a new trial upon the ground that it was prevented from proving a reasonable probability of an adverse effect on competition in a wider market. It states that the District Court forbade evidence of a wider market at pre-trial (Petition, p. 20) (R. 1369). No such prohibition appears. The Court merely indicated at that time that petitioner would have difficulty in convincing it with respect to evidence of other markets (R. 1369).

The petitioner asserts that the District Court enforced its prohibition at the trial (Petition, p. 20). The only reference in the petition, however, is to the exclusion of portions of an exhibit upon the ground of hearsay (Petition, p. 20; R. 163, 164).

No reference is made to any evidence or offer of evidence in the record that petitioner intended to enter or that any competitor was affected or even existed in other areas.

As the Circuit Court said:

> "Union Leader produced no evidence that the shareholders feared competition as such, or had any reason to.
>
> * * * * *
>
> "Union Leader must show a 'reasonable probability' that an adverse effect on competition is 'likely' to result. See *United States* v. *E. I. duPont de Nemours & Co.*, 1957, 353 U.S. 586, 589. It has not shown even a reasonable possibility that competition is likely to ex-

ist, much less that such competition would be adversely affected." (Petition, Appendix A, pp. 36-37.)

The dismissal of petitioner's claim against these respondents by the Courts below was clearly correct. Pure economics has dictated that most of our cities can support only one high-grade daily newspaper.

*Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 603.

They are referred to herein as natural monopoly newspapers.

The essence of petitioner's claim contains its own refutation.

Because (*a*) petitioner, the owner of a natural monopoly newspaper in Manchester, New Hampshire, commenced publishing the Journal, as a rival to the strike-bound Gazette, the existing natural monopoly newspaper in Haverhill, Massachusetts (R. 1068, 1069, 1070), and (*b*), as a result of petitioner's own predatory tactics and attempt to monopolize (a review of which is not sought on the questions presented in this petition), the stockholders of the Gazette might have been forced to sell to petitioner (R. 1074, 1075, 1079), but (*c*), with other publishers, concerns or persons interested in natural monopoly newspapers in other cities, respondent Weld individually bought shares in NNE which bought the Gazette which continues to compete with the Journal in Haverhill (R. 1083-1084), and (*d*) Weld owns the controlling interest in respondent Essex County Newspapers, Inc., which bought no shares but which publishes the only daily papers in Gloucester and Newburyport, Massachusetts (R. 1084), and (*e*) Weld bought the shares

in NXE in part because it was a good investment, in part because he disapproved of petitioner's predatory tactics in Haverhill, and in part because he sympathized with the owners of the Gazette and feared that he might at some time be a victim of a similar distress (R. 1086), petitioner contends that the lower Courts clearly erred in rejecting petitioner's contrary conclusions and in finding that these respondents did not violate either section 2 of the Sherman Act or section 7 of the Clayton Act.

Not only was there no error, but, it is believed, the conclusions sought by petitioner, if found, would have been clearly erroneous.

The fallacy of petitioner's contention is emphasized by its resort to a misstatement of findings. Petitioner asserts that it was found that some shareholders acted because they feared that petitioner might introduce a competing newspaper in or invade their towns (Petition, pp. 18, 20). There was no such finding. The District Court found that each shareholder invested because he reasonably believed that it was commercially justified (R. 1085), that there was no basis for concluding that any other motive was primary (R. 1098), that many acted in part because, individually, they did not approve of Loeb's tactics in Haverhill, which they regarded as predatory, unfair or unethical (R. 1086), and that some acted in part because, individually, they sympathized with the owners of the Gazette, and feared lest they might at some time be victims of a similar distress (R. 1086).

After fully examining the record, the Court of Appeals concluded that at most there was some opposition to Loeb's unlawful methods, but that there was no evidence of a monopolistic intent, or of a fear of competition as such, or of a tendency substantially to lessen competition (Appendix A to Petition, pp. 36-37).

## Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

LOTHROP WITHINGTON,
JOHN F. GRODEN,
CHARLES C. WORTH,
73 Tremont Street,
Boston 8, Massachusetts,
Attorneys for Respondents
PHILIP S. WELD and
ESSEX COUNTY NEWSPAPERS, INC.

WITHINGTON, CROSS, PARK & MCCANN,
73 Tremont Street,
Boston 8, Massachusetts,
Of Counsel.